

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

ORDER

Pending before the Court is a motion by non-party Onyx Software Corporation (“Onyx”) to seal a portion of these proceedings. Onyx Chief Executive Officer Brent Frei has been presented as a witness by Defendant Microsoft in conjunction with a hearing being held on the appropriate remedy for antitrust violations found by the District Court in this case and affirmed by the Court of Appeals. Based upon the detailed legal brief and declarations filed by Onyx, as well as the oral proffers of Onyx and Plaintiffs, the Court concludes that Onyx’s motion to close the courtroom for a limited period of time shall be granted.

In response to Onyx’s motion, the Court discussed the issue with counsel for Plaintiffs, Microsoft, and Onyx in a bench conference, the transcript of which remains under seal and is incorporated herein by reference. Due to the detailed nature of Onyx’s motion and the materials filed in conjunction with that motion, the Court will not characterize the confidential business information at issue. As indicated in the colloquy with the Court, during her cross-examination of Mr. Frei, counsel for Plaintiffs plans to ask questions regarding Microsoft’s relationship with Onyx. Questions on this same subject were posed during Mr. Frei’s deposition. Onyx proffered

in its written motion and explained during its sealed colloquy with the Court and the parties that Mr. Frei's expected responses at trial, like his responses at deposition, will reflect this sensitive corporate information. The release of this information would cause substantial harm to Onyx's competitive position. The parties and Onyx agree that the relevant portion of cross-examination and redirect examination should be conducted under seal.

Case law from the D.C. Circuit acknowledges that, in general, "[t]he first amendment guarantees the press and the public a general right of access to Court proceedings." *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). However, this right of access is far from absolute, as courts have recognized numerous exceptions to the general rule of openness. *See Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) (listing various exceptions). Although much of the available case law on the subject of openness arises in the criminal context, the "presumption of openness" applies in the civil context as well. *See Johnson v. Greater Southeast Community Hosp. Ctr.*, 951 F.2d 1267, 1277 (D.C. Cir. 1991). This presumption may be overcome "by an overriding interest based on findings that disclosure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). Protecting an entity's "competitive standing" through retained confidentiality in business information has been recognized as an appropriate justification for the restriction of public or press access. *Nixon*, 935 F.2d at 287.

Having reviewed the relevant deposition testimony and in light of Plaintiffs' proffered line of inquiry and Onyx's proffered business interest in maintaining confidentiality, the Court finds that any release, via testimony or display of the deposition testimony, of the information discussed in Onyx's motion would result in "clearly defined and very serious injury" to Onyx's

business interest. *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (quoting *United States v. International Business Machines, Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)). As a result, the Court concludes that any inquiry related to the subjects discussed in Onyx's motion and during the bench conference should be conducted under seal, in a closed courtroom. In this regard, the Court notes that the closure of the courtroom and the sealing of testimony are narrowly tailored to include only the specific information which, if released, would be detrimental to Onyx's business interest. *See Press-Enterprise*, 464 U.S. at 510. The relevant information has heretofore remained confidential and would not become public but for its use in these proceedings. Other portions of the cross-examination and redirect examination of Mr. Frei will be held in open court and on the public record, as will all other appropriate portions of evidence in this proceeding.

Accordingly, it is this 19th day of April, 2002, hereby

ORDERED that the motion of non-party Onyx to file its written motion under seal is GRANTED; and it is further

ORDERED that Onyx's motion to seal proceedings is GRANTED to the extent described above and during the sealed bench conference; and it is further

ORDERED that the above-specified portions of the proceedings in this case shall be conducted under seal.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge